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Date: 9/20/02 9:59AM
Subject: comment on proposed rule change MCR 2.410 (D)(3)(a) and (b)

The proposed change to MCR 2.410 (D)(3)(a) and (b) , which would provide sanctions for failure to participate in ADR proceedings "in good faith" are in apparent conflict with the provision of MCR 2.411(C)(3) as well as with MRE 408.

MCR 2.411(C)(3) requires that after completion of ADR the mediator advises the court ONLY as to date of completion, who participated, whether settlement is reached, and whether further ADR proceedings are anticipated. Injecting the possibility that the mediator or the court could make a determination that parties had failed to participate "in good faith" would completely undermine the integrity of any ADR process.

Furthermore, MRE 408 provides that "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." Certainly ADR proceedings are compromise negotiations, and thus sanctioning parties for how they participate would be inadmissible.

I spend most of my professional time working with ADR in some form, so I am certainly in favor of promoting it as much as possible. I also believe that courts should require parties to participate in ADR. However, courts should not have the power to inquire into the success or failure of the process beyond monitoring whether parties and representatives attend.

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